

NO. COA14-850

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

IN THE MATTER OF:

RAYMOND KYLE ALESSANDRINI,  
Custodian Under NC Uniform  
Transfers to Minors Act.

Rowan County  
No. 11 SP 151

Appeal by Petitioners from order entered 7 April 2014 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 7 January 2015.

*Raymond Kyle Alessandrini, pro se, for respondent.*

*Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.L.L.C., by John F. Scarbrough, for petitioners.*

TYSON, Judge.

Michell Alessandrini, Ainsley Alesandrini and Vince Allesandrini ("petitioners") appeal from an order which denied their motion for summary judgment and granted summary judgment in favor of Raymond Alessandrini ("respondent"). We affirm.

I. Background

In the 1990's, respondent's father established accounts for the benefit of respondent's three children pursuant to the Uniform Transfers to Minors Act ("UTMA"). Respondent Raymond

Alessandrini, their father, was named as the custodian. The bulk of the custodial funds are deposited in two Edward Jones accounts, one for the benefit of Ainsley, and the other for the benefit of Vince.

On 11 February 2011, the children's mother, petitioner Michell Alessandrini, filed a special proceeding on behalf of the children and petitioned the Rowan County Clerk of the Superior Court for an accounting. Petitioners alleged respondent had refused to produce the financial records of the accounts, refused to release funds to pay for expenses of the children, and improperly withdrew custodial funds. Petitioners filed an amended petition on 24 August 2012 to require respondent to fully account, immediately pay for certain expenses of the children, reimburse the accounts for any misappropriated funds, and to pay petitioners' attorney's fees and costs.

The matter was heard before the Clerk of the Rowan County Superior Court on 4 October 2012. The Clerk ordered respondent to file an accounting of funds. Respondent filed the accounting on 4 January 2013. The accounting showed that respondent withdrew \$5,000.00 from the Edward Jones custodial account for the benefit of Ainsley by check dated 1 September 2009. He withdrew \$22,749.97

from the Edward Jones custodial account for the benefit of Vince by check dated 22 July 2010.

Following respondent's filing, the Clerk of the Rowan County Superior Court recused himself from further participation due to an unrelated conflict of interest. Pursuant to a joint motion of the parties under N.C. Gen. Stat. § 7A-104(b), the superior court entered an order and removed the special proceeding to the superior court. On 28 February 2014, petitioners filed a motion for summary judgment for the relief requested in the 24 August 2012 amended petition. On 27 March 2014, respondent filed a cross motion for summary judgment.

The parties' motions for summary judgment were heard on 7 April 2014. The court found no genuine issue of material fact existed, denied petitioners' motion for summary judgment, and granted summary judgment in favor of respondent. Petitioners appeal.

## II. Summary Judgment

Petitioners' sole argument on appeal asserts the trial court erred in denying their motion for summary judgment and by granting summary judgment for respondent. Petitioners argue genuine issues of material fact existed of whether respondent breached his fiduciary duty by paying himself \$5,000.00 from Ainsley's

custodial account and \$22,749.97 from Vince's custodial account. We disagree.

A. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013).

An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense. A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on 'undisputed aspects of the opposing evidential forecast,' where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

*Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (internal citations omitted).

"In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to

the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citation omitted). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

B. UTMA

Chapter 33A of our General Statutes, entitled "North Carolina Uniform Transfers to Minors Act," governs UTMA accounts in this State. N.C. Gen. Stat. § 33A-12(a) sets forth the fiduciary duties of a custodian concerning custodial property. The statute provides the custodian shall: "(1) Take control of custodial property; (2) Register or record title to custodial property if appropriate; and (3) Collect, hold, manage, invest, and reinvest custodial property." N.C. Gen. Stat. § 33A-12(a) (2013). "In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries." N.C. Gen. Stat. § 33A-12(b) (2013).

The Act requires the custodian to keep the custodial property separate and distinct from all other property, so that it can be clearly identified as custodial property of the minor. N.C. Gen. Stat. § 33A-12(d) (2013). The custodian is required to "keep

records of all transactions with respect to custodial property."

N.C. Gen. Stat. § 33A-12(e) (2013).

C. Use of Custodial Property

N.C. Gen. Stat. § 33A-14, entitled "Use of Custodial Property," states:

(a) A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (i) the duty or ability of the custodian personally or of any other person to support the minor, or (ii) any other income or property of the minor which may be applicable or available for that purpose.

N.C. Gen. Stat. § 33A-14(a) (2013). Use of custodial funds is in addition to, not in substitution for, the parental obligation to support the minor. N.C. Gen. Stat. § 33A-14(c) (2013).

In support of his motion for summary judgment, respondent's affidavit states that at or near the time of the \$5,000.00 withdrawal from Ainsley's account, she had incurred college tuition expenses of \$5,315.75, and the \$5,000.00 withdrawal contributed to her tuition.

Respondent's affidavit further states that at or near the time of the withdrawal of \$22,749.97, Vince had incurred expenses related to travel abroad totaling \$8,593.32. Vince also incurred expenses for his computer in the amount of \$1,709.23, and expenses

related to his vehicle in the amount of \$6,454.53. The remainder of respondent's accounting for Vince's UTMA account shows purchases from drug stores and clothing stores and orthodontic expenses.

Petitioner presented no evidence and does not argue the expenditures incurred and set forth in respondent's affidavit and accounting were not paid for the benefit of the children, nor do they argue that respondent did not pay the expenses out of pocket. Petitioners do not argue that respondent used the custodial funds to reimburse himself for expenses paid within the normal support obligations of parenthood. N.C. Gen. Stat. § 33A-14(c) (2013). Instead, petitioners argue that respondent's reimbursement for these expenses he had paid out of pocket was a *per se* breach of his fiduciary duty.

Petitioners correctly note this Court has not interpreted the Uniform Transfers to Minors Act in this specific context: whether it is permissible for a custodian to pay expenses of the minor out of his pocket and later reimburse himself from the custodial funds.

Although our Uniform Trust Code does not apply to Chapter 33A for custodial accounts, we find its provisions, as well as case law involving trusts, to be persuasive to resolve issues regarding custodial accounts under the UTMA. *See Belk v. Belk*, 221 N.C.

App. 1, 728 S.E.2d 356 (2012) (applying trust law principles in determining appropriate remedy when a custodian misappropriates UTMA account funds).

In the context of a trustee, our Supreme Court adhered as follows:

The court will not undertake to control the trustee with respect to the exercise of a discretionary power, except to prevent an abuse by him of his discretion. The trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper even though not a dishonest motive, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment.

*Woodard v. Mordecai*, 234 N.C. 463, 471, 67 S.E.2d 639, 644 (1951) (citing Restatement of the Law of Trusts, section 187; *Carter v. Young*, 193 N.C. 678, 137 S.E. 875 (1927)). We apply this reasoning to a custodian under the Uniform Transfers to Minors Act.

The uncontested evidence shows that respondent paid expenses for the benefit of Ainsley and Vince from personal funds, and later reimbursed himself from their UTMA accounts. No evidence tends to show respondent reimbursed more than he expended or incurred expenses or took funds unrelated to the benefit of the children. Nothing on the record tends to show respondent acted with a dishonest purpose or a lack of reasonable judgment in managing and dispersing the funds in the UTMA accounts.

In opposing respondent's claim that the withdrawals were reimbursements for out-of-pocket expenses he paid for the benefit of the minors, petitioners note respondent paid two of Ainsley's college tuition payments after withdrawing \$5,000.00 from the account. Those tuition payments were made near the time of the withdrawal.

Ainsley was enrolled in college and the record shows tuition payments were due periodically. While respondent may have refrained from paying himself from Ainsley's account prior to paying the tuition, the evidence before the trial court fails to show respondent acted dishonestly or unreasonably as custodian in managing and dispersing the funds in the UTMA accounts, or otherwise breached his fiduciary duty. Petitioners' arguments are overruled. The order of the trial court denying petitioners' motion for summary judgment and granting summary judgment in favor of respondent is affirmed.

### III. Conclusion

The superior court correctly held no genuine issue of material fact exists, and properly granted summary judgment in favor of respondent and denied petitioners' motion for summary judgment. The uncontroverted evidence showed respondent paid reasonable expenses for the benefit of the minors out of his personal funds

and reimbursed himself from the custodial accounts. The trial court's order is affirmed.

Affirmed.

Judges ELMORE and DAVIS concur.